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Supreme Court of the United States

October Term—1951

No. 71

MUNDET CORK CORPORATION,

Petitioner,

—vs.—

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY WITH BRIEF IN SUPPORT THEREOF

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Petition for Writ of Certiorari

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mundet Cork Corporation, respectfully makes application for a writ of certiorari to review the judgment of the Supreme Court of New Jersey, entered January 21, 1952, and to review the Order of said Court denying petition for rehearing, entered February 18, 1952.

A

Summary Statement of the Matter Involved

This is a criminal action. Petitioner, by complaint filed in the Municipal Court of the Township of Hillside, was charged with a violation of the Township smoke ordinance on July 31, 1950. Following conviction before the magistrate, petitioner appealed to the Union County Court, where, after a trial *de novo*, a judgment of conviction was entered. On appeal, the Supreme Court of New Jersey affirmed by a divided court, 4 to 3, Vanderbilt, C. J., Case and Oliphant, JJ. dissenting. The opinion and mandate were filed on January 21, 1952. A petition for rehearing was denied by the Supreme Court of New Jersey, by order entered February 18, 1952.

By this petition, the petitioner seeks a review of both the judgment of affirmance entered January 21, 1952, and the order of February 18, 1952 denying rehearing.

B

Basis of Jurisdiction

Petitioner claims that its rights under the Fourteenth Amendment of the Constitution of the United States have been violated. Therefore, this Court has jurisdiction by virtue of Section 1257 (3) of the Judicial Code (28 U. S. C. §1257 (3)).

Petitioner has been denied due process of law, contrary to the Fourteenth Amendment, in two respects:

Petitioner's guilt was determined by the Supreme Court of New Jersey on the basis of facts occurring months after the date of the offense charged. The Supreme Court of New Jersey, in its opinion, 8 N. J. 359 beginning at 371, 86 Atl. (2d) 1 beginning at 7, recognized the validity of the defense of unavoidable necessity, and then reviewed the evidence to conclude that the facts did not support the application of such defense of unavoidable necessity. In its review of the evidence, the Supreme Court of New Jersey decided the case upon facts which, the opinion neglects to state, had not existed as of the time of the offense charged, but which had come into being some months thereafter. Upon the coming down of the opinion, petitioner seasonably filed with the Supreme Court of New Jersey a petition for rehearing, which specifically pointed out, on pages 2 and 3 thereof:

> "7. By holding this defendant guilty in criminal proceedings on the basis of facts which did not come into being until months after the alleged offense had been committed, the Court has denied defendant due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.
>
> "8. By holding this defendant guilty of a violation of the Hillside Smoke Ordinance on July 31, 1950, as charged, on the basis of facts which did not come into being until months after the alleged violation occurred, this Court has permitted an unreasonable application of said Ordinance, so as to deprive defendant of its property without due process of law and violation of the Fourteenth Amendment of the Constitution of the United States."

The Supreme Court of New Jersey, however, denied the petition for rehearing by its order filed February 18, 1952. These two precise constitutional questions had not been

raised prior to the coming down of the opinion of the Supreme Court of New Jersey on January 21, 1952, and they were raised only because of the express basis upon which the Supreme Court of New Jersey grounded its affirmance of the conviction.

C

Questions Presented

1. By having been held guilty in criminal proceedings on the basis of facts which did not come into being until months after the alleged offense had been committed and the complaint filed, has petitioner been denied due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States?

2. By having been held guilty of a violation of the Hillside Smoke Ordinance on July 31, 1950, as charged, on the basis of facts which did not come into being until months after the alleged violation had occurred and the complaint filed, has there been an unreasonable application of said ordinance, so as to deprive defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States?

D

Reasons Relied on For Allowance of Writ

The court below, contrary to precedent, relied upon facts occurring after the date of the offense charged and after the filing of the complaint, in overruling the defense of unavoidable necessity, and in thereby determining petitioner's guilt in a criminal proceeding.

(a) The action of the court below therefore had the effect of the application of an *ex post facto* law. This amounts to a denial of due process of law, in violation of the Fourteenth Amendment.

(b) The court below, therefore, made an unreasonable application of the Hillside Smoke Ordinance, so as, in effect, to prescribe the operation of petitioner's plant, whereas the true facts did not reasonably warrant such action. This amounts to a deprivation of petitioner's property without due process of law, in violation of the Fourteenth Amendment.

These are federal questions of substance not heretofore determined by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of New Jersey, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. A-50, September Term—1951, *State of New Jersey, Plaintiff-Respondent,* v. *Mundet Cork Corporation, Defendant-Appellant,* and that the judgment of the Supreme Court of New Jersey may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MUNDET CORK CORPORATION

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Of Counsel.

Supreme Court of the United States

October Term—1951

No.

MUNDET CORK CORPORATION,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Opinion of the Court Below

The opinion of the Supreme Court of New Jersey is reported at 8 N. J. 359, 86 Atl. (2d) 1.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Section 1257 (3) of the Judicial Code, on the grounds of a denial of due process of law to petitioner by the court below, in contravention of the Fourteenth Amendment of the Constitution of the United States.

The grounds of jurisdiction have been more fully set forth under the heading "Basis of Jurisdiction" in the Petition, and are not repeated here.

Statement of the Case

This is a criminal action. Petitioner, by complaint filed in the Municipal Court of the Township of Hillside, was charged with a violation of the Township Smoke Ordinance on July 31, 1950. Following conviction before the magistrate, petitioner appealed to the Union County Court, where, after a trial *de novo*, a judgment of conviction was entered. On appeal, the Supreme Court of New Jersey affirmed by a divided court.

The petitioner, also referred to herein as the defendant, has since 1918 owned and operated a plant in Hillside which produces cork board (D59a-15). The cork board is produced from raw ground cork by the so-called steam baking process. The raw ground cork is placed in a mould under pressure, through which superheated steam is passed (D40a-40 to D41a-13; D130a-8 to 35), which fuses the particles into a cork board (D66a-8). The steam is then drawn off through a water wash (D63a-19) and passes into the open air through a gooseneck stack.

The Supreme Court of New Jersey construed the Hillside Smoke Ordinance to apply to the odor-bearing steam emanating from the gooseneck stack. 8 N. J. at 367, 86 Atl. (2d) at 5. It also held that the evidence established a violation of the ordinance. 8 N. J. 367, 86 Atl. (2d) 5.

The questions as to which review is sought in this Court all revolve around the defense of unavoidable necessity. If established, this defense would compel an acquittal. The doctrine of the defense of unavoidable necessity was accepted by the court below, but the holding was that the

facts did not support it, 8 N. J. 371, 86 Atl. (2d) 7. The essence of the denial of due process herein consists of the manner in which the court below regarded the evidence bearing upon this defense. Hence a resume of the pertinent evidence must be made.

The proof bearing upon the defense of unavoidable necessity established the following:

There was an abundance of expert testimony, completely uncontradicted, that as of July 31, 1950, there was no known practicable method of eliminating the odor complained of. Of the four companies manufacturing cork board by the steam-baking process none of them has been able to eliminate all odors (D104a-17 to 31). Representatives of three of these companies testified at the trial. Mr. Schwarz, an engineer by profession (D49a-27 to 33), associated with United Cork Company for thirty-seven years and now its Chief Engineer (D49a-34 to D50a-7), testified that he knew of no method that "is both scientifically effective and economically feasible by entirely eliminating all steam and odor by products emanated by the steam-baking process" (D51a-7 to 12). Mr. Simeral, an engineer by profession (D96a-26 to 40), with extensive background in problems of this kind (D97a-5 to 30) and connected with Armstrong Cork Company since 1931 (D97a-23 to 34), testified as length. He had helped design the pressure molds at the Mundet Plant in which the cork is baked (D97a-38 to D98a-11). Since his own company uses the same method as that used at Mundet (D60a-11 to 16; D98a-27), he is familiar with the same problem. He testified that Armstrong has engaged in experimentation to eliminate the steam and odor by-products for twenty years, the last five years under his supervision (D103a-25 to D104a-12). He stated (D105a-7):

> "Q. Do you know of any way of eliminating all odor emanating from cork baking, without regard to cost? A. No.

> "Q. Do you know of any practical method which the Mundet Company could have applied at their Hillside Plant on July 31, 1951, which would have eliminated the steam odor from its steam-baking process? A. I do not."

It further appeared that Mundet has been a pioneer in research and experimentation in the problems of odor elimination. Mr. Bruns, a Vice President and Director of defendant, testified to the extent and scope of some of Mundet's experiments (D61a-24 to D62a-7). It further appeared that in 1949, Mundet entered into a contract with one Dr. Schneider, of Micro-Chemical Institute, who represented that he had designed and perfected a system which would eliminate steam and remove odors from the plant at Hillside, although such representations turned out to be untrue (D76a-31 to D77a-13). The results of Dr. Schneider's work were a flat failure (D62a-16), so that he was fired in September, 1950 (D78a-23 to 29). Since that time, the engineering department of Mundet has continued its experiments (D62a-25), under the supervision of Mr. Magrum (D76a-13 to 20). As of July 31, 1950, Mr. Magrum knew of no method which would solve the problem (D94a-35 to D95a-22). Similarly, Mr. Berghorn, an engineer with eleven years' association with the cork industry (D119a-17 to 27), testified (D125a-17 to 20):

> "Q. Do you know of any method which was available as of July 31, 1950, by which the odor from the gooseneck stack could have been eliminated? A. No."

Down to the time of trial, Mundet had spent approximately $25,000.00 on its recent experimentation, with additional expenditure of between $8,500.00 and $10,000.00 in prospect (D81a-37 to D82a-10).

It was admitted by the Township that the manufacture of cork board represents one of the purposes for which

defendant has been chartered (D58a-20 to D59a-11). Defendant carries on this activity in the portion of Hillside zoned for industrial purposes (D121a-28 to 35). There are a number of other industrial factories in the immediate vicinity (D121a-36 to D123a-20). Based upon the assessment of its property, and the taxes paid, and the size of the payroll, the Mundet plant is a substantial operation (D60a-17 to D61a-23). The plant is playing a significant part in fulfilling defense contracts (D59a-34 to D60a-10; D80a-34 to D81a-12). The steam-baking method of cork board manufacture is considered the most modern and up-to-date in the industry and produces the best product (D104a-27 to 33). There is no standard equipment available on the market designed to eliminate the steam and odor emanating from the steam-baking process (D104a-35 to D105a-6).

The denial of petitioner's rights by the court below sprang from the erroneous and unwarranted inferences which it drew from the facts.

The complaint charges petitioner with a violation of the Hillside Smoke Ordinance on July 31, 1950. The complaint was verified and filed on August 31, 1950.

In the review of the evidence set forth in its opinion, the Supreme Court of New Jersey entirely disregarded the time factor, and relied upon developments occurring in January 1951 as indicating the state of affairs existing at the time the alleged offense was committed some six months previously. Moreover, the opinion below contains inaccuracies; testimony has been taken from its context, divorced of qualifying statements, and given a meaning entirely different from what a reading of the transcript shows the witness obviously meant.

The testimony as to the progress made by defendant in its own experimentation after September 1950, which was

two months after the date of the offense as charged, when properly understood further illustrates the difficulty of the engineering problems involved, and the good faith of defendant in continuing its efforts with their attendant success. Yet some of this testimony was seized upon by the court below and relied upon as the basis of concluding that the problem had been capable of practical solution back in July and August of 1950.

The court below, in its opinion, summarized the evidence as follows (8 N. J. at 371; 86 Atl. (2d) at 7):

> "The pertinent evidence is as follows: Bruns, vice-president and director of the defendant, testified that the defendant had been conducting experiments in the control of steam, including washing, ozination, chlorination, electrical precipitation and secondary combustion, and that the defendant was working on and installing a carbon eliminator, which it hoped would be succecssful, but which it had not disclosed in detail because the process was believed patentable. Magrum, a vice-president of defendant in charge of manufacturing and engineering at the Hillside plant, testified that additional equipment had been ordered by the defendant and the problem was well on the way to solution, although delivery of the equipment might suffer delay due to the national emergency. Magrum testified that it was possible through the use of a mere condensation device to eliminate the emission of steam into the atmosphere, that such a method had not been employed because 'it becomes a mechanical problem' to take out the necessary amount of heat, that it is a matter of expense and space but the matter of expense would not be insuperable. He testified that no mechanical process could be introduced to absorb the steam coming from a stack *of the diameter used by the defendant.* Magrum further testified that use of absorbent oils proved 'quite promising' in experimental work but had not been used in actual operation although use of such oils might be a feasible

solution to the condition. He admitted that it would be feasible to eliminate the fumes and that the conditions were susceptible to exclusion; that laboratory tests had the 'appearance' of success. Simeral, who largely related his testimony to plants of other companies with different equipment and at different locations, was offered as an expert witness and testified that there is no way of eliminating *all* odors emanating from baking cork. He testified that at a Camden N. J., plant there is no exhaust steam emitted into the atmosphere 'because we condense the steam immediately after it leaves the moulds.' However, he also testified that at the Camden plant an unlimited supply of Delaware River water was available for use in the condensation equipment. Schwartz an expert not familiar with the details of operation of the defendant's plant, testified that there is no 'scientifically effective and economically feasible' method for '*entirely* eliminating all steam and odor bi-products of the cork baking process' (emphasis supplied) but we note that *entire* elimination of *all* steam and odor is not required by the ordinance, which prohibits fumes of designated densities.

"Analysis of the foregoing testimony, introduced by defendant to prove unavoidable necessity, shows that experimentation in various methods of elimination of the exhaust vapor condition at defendant's plant have been conducted; that some of these experiments show success but have not been applied; that a condensation device could be used but has not been used because 'it is a mechanical problem,' although the expense is not insuperable; and that a condensation method is in successful use elsewhere in a locality where river water is available for the type of condensation apparatus involved."

The inaccuracies in the quoted portion of the opinion, which result in the denial of due process, become readily apparent upon a comparative analysis of statements contained therein and of the testimony in the record.

The opinion does not mention it, but Berghorn testified at D94a-36:

> "Q. As of July 31, did you know of a method which you believed would solve the problem? A. No."

The opinion dos not mention it, but Berghorn testified that he did not know of any method which was available as of July 31, 1950, by which the odor from the gooseneck stack could have been eliminated (D125a-17).

In its opinion the Court belows says that Simeral testified "that there is no way of eliminating *all* odors emanating from baking cork". This is an obvious reference to Simeral's testimony at D105a-7. The opinion omits reference to the very next question asked Simeral (D105a-10), as follows:

> "Q. Do you know of any practical method which the Mundet Company could have applied at its Hillside plant on July 31, 1950, which would have eliminated the steam odor from its cork baking process? A. I do not."

With respect to the testimony of Henry H. Bruns, vice-president and director of the defendant, opinion states that Bruns:

> "* * * testified that defendant had been conducting experiments in the control of steam, including washing, ozination, chlorination, electrical precipitation and secondary combustion * * *."

The significant part of the testimony, which the opinion omits to state, is that none of these methods had worked. The testimony to which the opinion refers, beginning at D61a-28, reads as follows:

> "Q. Will you describe briefly what that cork experimentation consisted of? A. It covers a number

of efforts made to wash the steam. It covers the Hasen Dye Company that we thought could treat it with ozone.

Q. May I interrupt and ask what the result of that ozination was? A. It was not a success, it did not do the job. Chlorination was tried; that did not do the work. A copper system was brought into the plant for full discussion. That is an electrical precipitation, and it did not work. We have tried secondary combustion, and it would not do the work. We currently, as mentioned in the testimony, gave a contract to the Micro Chemical Institute in the hope that they would be able to solve our problem, but that has not worked out."

We believe that the foregoing testimony—coupled with that of Schwarz (D51a-7 to 12), to which the Court did refer in its opinion, and which was not modified in any way on cross examination—with respect to the situation on July 31, 1950, the date of the offense, fully supports our assertion that the evidence is uncontradicted, that as of that date there was no known, practicable method of solving the problem complained of.

Our further assertions that the evidence referred to in the opinion concerned developments which began over a month after the date of the offense charged, and that the evidence does not support the Court's holding, are fully supported by the following analysis of most of the statements contained in the relevant portion of the Court's opinion.

The opinion says that Bruns testified "* * * that the defendant was working on and installing a carbon eliminator * * *". That statement is inaccurate. It is obviously a reference to Bruns' testimony on recross examination, beginning at D71a-26, as follows:

"Q. Your engineering staff had been working on this problem since the date of this alleged violation—
A. Oh, yes.

Q. (Continued) —until the present time? A. Yes, we have.

Q. Have they recently submitted any plan which is designed to eliminate this odor? A. We sent a plan to Mr. Hanson just very recently.

Q. Specifically, I believe it was on Friday of last week or last week or recently? A. Very recently.

Q. Is that plan designed to eliminate this odor? A. I can answer that by saying we hope.

Q. It was submitted for that purpose, however? A. It was submitted to the Township as a further gesture that we were trying to do something to assist the Township in overcoming its objection to us.

Q. And that plan called for the use of a carbon eliminator, so-called? A. That plan does not go into detail because we feel that what we are doing now may be of a patentable nature, and we would not care to disclose—I personally do not know what the detail is.

Q. You mean that you did not care to disclose the details to the Township at this time? A. Yes.

Q. So the plan submitted contained no detail substantially? A. It gives merely an overall outline sketch.

Q. But the sketch is reduced to this, that it does call for the use of what is called a carbon eliminator? A. It does not show anything. It shows the word *eliminate.*

Q. Eliminate? A. Yes.

Q. Does the eliminator call for the use of carbon in any form? A. I would not care to disclose what that eliminator calls for."

It will be observed that Bruns declined to state whether or not the plan called for the use of a carbon eliminator, and to that extent the statement in the opinion is inaccurate. There can be no doubt as to the meaning of Bruns' quoted testimony, in view of the testimony by Magrum, to the effect that the defendant's present plans did not contemplate the use of carbon, and that defendant's investigation showed that carbon had never been successfully used

as an eliminator (D80a-12 to 29). The opinion below ignores the fact that this plan had been developed *after* the date of the alleged defense, as the quoted testimony clearly shows.

In further reference to the plan which defendant was working on, and which the opinion erroneously described as calling for a carbon eliminator the opinion states that Bruns testified that the defendant "* * * hoped (the plan) would be successful, but which it had not disclosed in detail because the process was believed patentable". The quoted testimony shows that this plan had been developed after the date of the alleged violation on July 31, 1950. Consequently, the hopes as to the success of defendant's plan were based upon a plan developed after the date of the violation, and did not represent the actual situation at the time the alleged offense was committed.

The opinion then refers to certain testimony of Magrum, most of which was developed by the Township on cross examination. The opinion says that Magrum "* * * testified that additional equipment had been ordered by the defendant * * *". The testimony of Magrum to which opinion refers was on cross examination, and appears at D82a-31, as follows:

> "Q. May I ask when that equipment was ordered? A. The equipment that was necessary to form a definite opinion on step number two was ordered last October and arrived early in January and was installed in January and tested in January, and at the end of January, 1951, the additional equipment was ordered, and the indications pointed to the need for additional equipment and the hope that it would work, and then we placed the order for this larger amount of equipment, the last part of January, 1951, because up to that time we did not know what to order because it depends upon the test work."

The opinion implies that the additional equipment had been ordered by the defendant prior to the alleged violation on July 31, 1950, but the testimony is that it was ordered in October, 1950 and in January 1951—three and six months after the date of the alleged violation.

The opinion goes on to state that Magrum testified "* * * the problem was well on the way to solution * * *". In their context in the opinion, these words imply that the problem of steam and odor elimination was well on the way to solution at the time of the alleged violation. That is not what Magrum said. The testimony to which the opinion refers is found at D79a. A reading of the testimony shows that the problem which Magrum felt was well on its way to solution was not the ultimate problem of odor elimination, but the technical problem, in the course of Mundet's experimentation of bringing steps or subsidiary problems together, to work in unison. Further, such progress towards a solution of this technical problem as had been accomplished, had been made since September, 1950, which was after the date of the alleged violation. All this is made clear by a reading of the testimony of Magrum on direct examination, as set forth at D79a-11, as follows:

> "A. * * * It is the same two basic problems, first of all what we term elimination of steam or beating down of steam or changing the form of steam with air, and the second one is a washing or absorption problem, but we attempted to solve each one individually and then to bring both types of mechanism together to work in unison, and the present status is the latter. We are now to bring the two steps together.
>
> Q. Did Doctor Schneider succeed in solving either one of these two problems? A. He succeeded in neither.
>
> Q. Since September, 1950, has Mundet Cork succeeded in solving either one of these problems? A. I believe we have solved both of them, but whether

> or not bringing the two types of mechanism together to work in unison will alter the condition, I don't know, but I feel that the problem of whatever nature it is is well on its way to solution."

Magrum made it clear on cross examination that by this testimony he did not mean that the ultimate problem had been solved, but that such was merely his hope at the time of the trial *de novo*. Thus Magrum testified, beginning at D82a-16, as follows:

> "Q. You say that you believe that you solved both of these problems including steam and odor at the present time and then you have additional equipment on order which I assume—and you may tell me so—will solve both of these problems, in your opinion? A. I didn't say it would; I said that the indication was that it will, but I cannot control what Nature is going to do.
>
> Q. In your best judgment as an engineer and as a result of consideration and analysis and effort that you have given to these problems, it is your belief that they will be solved with the use of additional equipment now on order? A. That is my hope."

The opinion below further states: "Magrum testified that it was possible, through the use of a mere condensation device, to eliminate the emission of steam into the atmosphere." The opinion neglects to point out that in such testimony Magrum was speaking only in theory, and said that elimination might be impossible to accomplish in practice. The testimony to which the opinion refers, on cross examination, reads as follows, beginning at D84a-28:

> "Q. Is it possible through the use of a mere condensation device to eliminate the emission of

steam into the atmosphere? A. Yes, that is possible.

Q. Why was that method not employed hitherto? A. Well, it becomes a mechanical problem. In order to take out the amount of heat, the heat has to be put some place, it has to go some place.

Q. It entails more of a mechanical operation, doesn't it? A. I am speaking now in theory. It might be an impossible thing to accomplish."

The opinion below goes on to state that Magrum testified with respect to the condensation device, "* * * that such a method had not been employed 'because it becomes a mechanical problem' to take out the necessary amount of heat; that it is a matter of expense and space, but the matter of expense would not be insuperable". The opinion omits the most significant fact in Magrum's testimony, which was that the mechanical problem itself was insuperable. Magrum's testimony (on cross examination) begins at D85a-15, as follows:

"Q. Do you think that the condensation of steam, even at 375 degrees, presents an insuperable mechanical problem? A. Under the conditions there, yes.

Q. Would you have us believe that there is no device that you could have introduced to absorb and condense the steam in the quantity used by you at the temperature of its emission which would prohibit its emission into the atmosphere at the vicinity that has been testified to? A. I would.

Q. Would it be a matter of expense or a matter of space? A. It would be both. I think the expense is the least important of the items.

Q. So the matter would not be insuperable so far as expense involved? A. No, that would not."

The opinion further says: "Magrum further testified that the use of absorbent oils proved quite promising in

experimental work, but had not been used in actual operation, although the use of such oil might be a feasible solution to the condition". While that is true so far as it goes (D92a-9 to 33), it is not the whole truth, for the Court omits reference to Magrum's further testimony on the subject, on cross examination, beginning at D93a-24, as follows:

> "Q. Had you used absorbent oils? A. Experimentally.
> Q. Actually in operation? A. No.
> Q. How do you know they won't work? A. Because they do not work experimentally."

The opinion further states that Magrum "admitted that it would be feasible to eliminate the fume and that the conditions were susceptible to exclusion; * * *". This language is a reference to Magrum's testimony on cross examination at D94a-21 to 33. But this testimony must be read in conjunction with Magrum's testimony, which immediately followed, beginning at D94a-36 to 37 and D95a-23 to 32:

> "Q. As of July 31, 1950, did you know of a method which you believed would solve the problem? * * * A. No.
>
> *By Mr. English*:
>
> Q. Your present belief, therefore, is based upon what you have learned since July 31, 1950? A. Yes.
> Q. And that present belief is the result of experimentation perfected by the Mundet organization without the assistance of Doctor Schneider? A. Yes."

The significant fact which the opinion entirely overlooks, is that the witness' hopes as to solving the problem were all based upon defendant's experimentation conducted

after the date of the alleged violation, and that as of July 31, 1950 the witness knew of no method which would solve the problem.

The opinion below says that Magrum testified "that laboratory tests 'had the appearance' of success". This statement is obviously based on recross examination at D96a-11 and 12. A reading of that reference in its context shows that the laboratory tests which had the appearance of success were not those of Mundet, but were those of Doctor Schneider at the beginning of his work, which had been performed at a laboratory under different conditions than those which actually existed, and whose work had proved a flat failure in practical application by July 31, 1950, the date of the offense charged. The record reads beginning at D95a-35, as follows:

> "Q. At the very inception of Doctor Schneider's experiments isn't it true that tests have been made in conjunction with the United Cork Company, which tests proved to be successful? A. He did not.
>
> Q. And on the basis of that test he was instructed to proceed, is that true? A. That is partly true.
>
> Q. To what extent is it true? A. It was a laboratory test under different conditions than were actual.
>
> Q. But the test as performed appeared to be successful? A. It had that appearance."

This testimony must also be considered in the light of the abundant proof that Doctor Schneider's work was a flat failure. (See D62a-16; D77a-32 to 36; D79a-22).

The opinion below seeks to dispose of the testimony of Simeral by stating that he "largely related his testimony to plants of other companies with different equipment and at different locations * * *". That statement is only partly true, because Simeral testified on the basis of personal

familiarity with the equipment and location of the Mundet plant at Hillside. Mundet obtained the process used at Hillside from Armstrong Cork Company (D60a-11 to 16). Simeral, who was working for Armstrong at the time (D97a-23), helped to design and assemble the Mundet equipment at Hillside (D97a-38 to D98a-20). It was on the basis of his personal and informed knowledge of conditions at Hillside that Simeral testified (D105a-10), as follows:

> "Q. Do you know of any practical method which the Mundet Company could have applied at its Hillside plant on July 31, 1950, which would have eliminated the steam odor from its cork baking process? A. I do not."

The opinion in its emphasis on the fact that at a Camden, New Jersey plant steam is condensed from water from the unlimited supply of the Delaware River, overlooks the fact that no comparable water supply is available in Hillside. Simeral pointed out the impossibility of using the Camden method at the Mundet plant at Hillside (D103a-13 to 22).

The opinion below states: "analysis of the foregoing testimony introduced by defendant to prove unavoidable necessity, shows that experimentation in various methods of elimination of the exhaust vapor condition at defendant's plant has been conducted; that some of these experiments show success, but have not been applied * * *". The opinion overlooks the most significant factor which is that none of the experiments prior to July 31, 1950 had been successful, as Bruns testified at D61a-24 to D62a-7. The experiments which showed success, had shown their success after the date of the alleged violation, and they had not been applied at the time of the trial *de novo,* because the necessary equipment which had been ordered after the

date of the violation (D82a-30 to D83a-8), had not all been delivered at the time of the trial *de novo* before the County Court (D79a-31 to D80a-11). It must be borne in mind that no standard equipment to deal with this problem is available on the market (D104a-35 to D135a-6).

Continuing its analysis of the foregoing testimony, the opinion below states that "a condensation device could be used, but has not yet been used because 'it is a mechanical problem', although the expense is not insuperable; * * *". As already pointed out, the mechanical problem would be a solution only in theory, but under the conditions at the plant, it was insuperable (D84a-28 to D85a-25). Contrary to what the opinion says, the testimony shows that a condensation device could not be used, because of the insuperable mechanical problem. If the mechanical problem is insuperable, it makes no difference that the expense is not insuperable.

Continuing its analysis of the foregoing testimony, the opinion below states: "* * * that a condensation method is in successful use elsewhere in a locality where river water is available for the type of condensation apparatus involved". That statement is correct, but it is entirely irrelevant to the situation concerning Hillside where river water is not available.

The developments after September, 1950, upon which the Court largely relies in its opinion, and which were for the most part brought out by the Township on cross examination, reinforce rather than weaken the defense of unavoidable necessity as of July 31, 1950. These developments, when put in their proper setting, demonstrate that the problem of eliminating or mitigating the steam and odor complained of, even for a concern which, like the defendant, was the pioneer in dealing with the problem, was an unsolved problem as of July 31, 1950. They also show

that Mundet in good faith was trying to solve the problem both before and after the date of the offense charged. In other words the testimony which the Court below in its opinion largely relied upon emphasizes the fact that, despite the efforts and expense to which it went, defendant had found no method of eliminating the condition complained of at the time of the offense charged.

ARGUMENT

Introduction and Summary

1. This Court may re-examine the facts in order to determine for itself whether a federal right has been violated.

2. The reliance by the court below upon facts occurring after the date of the offense charged and after the filing of the complaint, in determining the sufficiency, in point of fact, of the defense of unavoidable necessity, and hence in determining the ultimate question of petitioner's guilt, has an *ex post facto* effect, which amounts to a denial of due process as guaranteed by the Fourteenth Amendment.

3. The elements of the defense of unavoidable necessity are considered, as preliminary to the final point.

4. In the light of the facts as existing at the time the alleged offense was committed, the application of the smoke ordinance to the defendant's plant was arbitrary and unreasonable, so that, in effect, it prescribed the operation of defendant's plant and thereby has deprived defendant of its property, all without due process of law.

POINT I

This Court may re-examine the facts.

The violations of petitioner's rights under the Federal Constitution arise from the erroneous and improper consideration given to the facts by the Supreme Court of New Jersey. It is petitioner's contention that the Supreme Court of New Jersey relied upon facts which arose after the date of the offense charged, and after the filing of the complaint, in overruling the defense and affirming petitioner's guilt. The soundness of this basic premise can be determined only by a re-examination of the facts. The Supreme Court of New Jersey, by denying the petition for rehearing, has refused to re-examine the facts in the light of the constitutional objections to its conclusions. Therefore, petitioner's rights under the Federal Constitution require that this Court re-examine the facts. There is no doubt that this Court may do so.

This Court has repeatedly held that where there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the state courts below, but will re-examine the facts in order to determine for itself whether the federal right has been violated.

So held in *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, VANDEVANTER, *J.*, at 591.

In *Norris* v. *Alabama*, 294 U. S. 587, this Court said, per HUGHES, *C. J.*, at 590:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance

and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, STONE, *C. J.*, said for the Court at 659:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

In *Niemotko* v. *Maryland*, 340 U. S. 268, the Court said, per VINSON, *C. J.*, at 271:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

Other cases to the same effect are:

Truax v. *Corrigan*, 257 U. S. 312, 324;
First National Bank v. *Hartford*, 273 U. S. 548, 552;
Fiske v. *Kansas*, 274 U. S. 380, 385;
Great Northern Ry. v. *Washington*, 300 U. S. 154, 165;

Pierre v. *Louisiana*, 306 U. S. 354, 358;
Chambers v. *Florida*, 309 U. S. 227, 228;
Smith v. *Texas*, 311 U. S. 128, 130;
Akins v. *Texas*, 325 U. S. 398, 401;
Pennekamp v. *Florida*, 328 U. S. 331, 335;
Patton v. *Mississippi*, 332 U. S. 463, 466;
Oyama v. *California*, 332 U. S. 633, 636;
Feiner v. *New York*, 340 U. S. 315, 316.

POINT II

The reliance by the Court below upon facts occurring after the filing of the complaint, in overruling the defense, has an *ex post facto* effect which denies due process of law as guaranteed by the Fourteenth Amendment.

The law is well settled that in order to justify a conviction, the evidence must be sufficient to show that the time at which the offense occurred was anterior to the commencement of the prosecution or that it was committed prior to the filing of the information or accusation or the finding of the indictment.

Davis v. *State*, 33 Ala. App. 601, 35 So. (2d) 621;
Lightner v. *State*, 126 Ga. 571, 55 S. E. 477;
Askew v. *State*, 3 Ga. App. 79, 59 S. E. 311;
Rivers v. *State*, 55 Ga. App. 290, 189 S. E. 923;
Maddox v. *Commonwealth*, 221 Ky. 257, 298 S. W. 688;
State v. *Luna*, 257 S. W. 161 (Mo. App.);
Zollicoffer v. *State*, 53 Tex. Cr. 316, 109 S. W. 171;
23 C. J. S. pp. 178-179, "Criminal Law" § 915;
Wharton on Criminal Pleading & Practice (8th Ed.), § 120.

In *Maddox* v. *Commonwealth, supra,* the Kentucky Court of Appeals reversed a conviction and held at 298 S. W. 688:

> "• • • In submitting this case to the jury, the court by its instructions omitted all reference as to the time within which the jury must find the offense to have been committed in order to convict the appellant. Under the instructions, the jury was at liberty to convict her for what she did after the finding of the indictment as well as what she did before, and, if before, for what she did at any time before, whether within 12 months or not. It is obvious that in this state of the record the instruction was fatally defective, and the evidence, because of its not fixing the time, insufficient to sustain the verdict. • • •"

The error which was held reversible in the *Maddox* v. *Commonwealth* case has in substance been committed by the Court below in its opinion, for reasons already set forth.

The Complaint herein was filed on August 31, 1950, and the facts relied upon by the Court below in its opinion to overrule the defense of unavoidable necessity did not come to pass until January 1951.

This is a criminal proceeding, *State* v. *Yaccarino,* 3 N. J. 291 at 295, 70 Atl. (2d) 84 at 86. If the defendant had been tried on the date that the Complaint was filed—August 31, 1950—the evidence as to experimentation and as to the hopes of success therein, upon which the opinion below has heavily relied, could not have been produced, because such matters had not yet taken place. Instead of determining defendant's guilt as of that date, or as of the date of the offense charged, the Court below has overruled the defense of unavoidable necessity on the basis of later facts, and has, therefore, determined defendant's guilt on the basis of different testimony than was then available.

If this result had been accomplished by statute instead of by judicial decision, it would be unconstitutional as an *ex post facto* law.

An *ex post facto* law was defined by Chief Justice FULLER, speaking for a unanimous court in *Duncan* v. *Missouri*, 152 U. S. 377, as follows at 382:

> "• • •
>
> It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage; • • •"

To the same effect:

> *Calder* v. *Bull*, 3 Dall. 386;
> *Cummings* v. *Missouri*, 4 Wall. 277, 326;
> *Kring* v. *Missouri*, 107 U. S. 221, 229;
> *Beazell* v. *Ohio*, 269 U. S. 167, 170;
> 16 C. J. S. pp. 886-887, "Const. Law" § 435.

The application by the Court below of a rule of law contrary to all precedent, which determines the defendant's guilt in a criminal proceeding on the basis of facts occurring months later, certainly changes the rules so that different testimony is sufficient to convict than was required when the offense was committed, and also alters the situation of the defendant to its disadvantage.

We recognize that § 10 of Article I of the Constitution of the United States, which forbids *ex post facto* laws, applies only to State legislation and not to erroneous decisions by a court, *Frank* v. *Mangum*, 237 U. S. 309, 344. But we contend that a judicial decision in a criminal proceeding

having the effect of an *ex post facto* law is so unreasonable as to deny the defendant due process of law.

A state may deprive a person of due process of law as effectively by the actions of its courts as by the acts of its legislature. *Shelley* v. *Kraemer*, 334 U. S. 1, 14.

Stating it in a different way, the situation in the case at bar is such that as of the date of the offense charged, and as of the date the complaint herein was filed, the available evidence clearly established the defense of unavoidable necessity. As of those dates, therefore, the petitioner had a valid defense to the accusation. The defense has been adjudged insufficient because reliance was placed by the court below upon facts occurring thereafter. The effect is the same as if a valid defense had been subsequently swept away by a statute. It has been held that a statute passed after a defendant has acquired a valid defense to a criminal charge, which deprives him of such defense, is unconstitutional under the Fourteenth Amendment as a denial of due process.

The leading case is *Moore* v. *State*, 43 N. J. L. 203, a decision of the New Jersey Court of Errors and Appeals. On March 14, 1879, the state legislature passed an act enlarging the period of limitations in criminal actions from two years to five years. The act was held unconstitutional as applied to an offense committed more than two, but less than five, years prior to the date of passage of the Act. The act was held invalid under the Fourteenth Amendment of the Federal Constitution in 43 N. J. L. at 208 and 212, and also as an *ex post facto* law in 43 N. J. L. at 214-223.

While not squarely passing upon the question, the Federal Courts have regarded a statute which wipes out a defense to a criminal charge as an *ex post facto* law, and invalid.

Falter v. *United States* (C. C. A., 2), 23 Fed. (2d) 420, 425, cert. den. 277 U. S. 590;
United States v. *Fraidin* (D. C. Md.), 63 Fed. Supp. 271, 279;
United States v. *Salberg* (N. D. Ohio), 287 Fed. 208, 213.

See also 22 C. J. S. p. 351, "Criminal Law" § 224.

The due process clause requires certain standards of relevancy and a decent concern for the truth, in the administration of criminal penalties. Thus, a statutory presumption will be declared invalid under the due process clause if there be no rational connection between the fact proved and the ultimate fact presumed, or if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Mobile, J. & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 43;
Bailey v. *Alabama,* 219 U. S. 219, 238, 239;
Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81;
Luria v. *United States,* 231 U. S. 9, 25;
McFarland v. *American Sugar Co.,* 241 U. S. 79, 86;
Western & Atlantic R. Co. v. *Henderson,* 279 U. S. 639, 642;
Manley v. *Georgia,* 279 U. S. 1, 5;
Tot v. *United States,* 319 U. S. 463, 467.

So also a decent concern for the truth results in a conviction which is secured by the use of perjured testimony known to be such by the prosecuting attorney being a denial of due process.

Mooney v. *Holohan,* 294 U. S. 103, 112;
Pyle v. *Kansas,* 317 U. S. 213, 216;
White v. *Ragen,* 324 U. S. 760, 764, rehearing denied, 326 U. S. 807.

If such be the standards of due process, they have not been met in the case at bar. The fact that some six months after the date of the offense there first appeared grounds for hoping that the problem would be solved, does not rationally establish that the condition could have been corrected at the time the offense was allegedly committed and the complaint was filed. Nor does the distortion of evidence on the part of the court below by lifting the statements of witnesses out of context and by completely ignoring the time element, comport with the requirements of due process.

For these reasons, in addition to the reason that the decision below has an *ex post facto* effect, there has been a denial of due process in contravention of the Fourteenth Amendment, for which redress may be had only in this Court.

POINT III

The doctrine of unavoidable necessity.

The gist of the defense of unavoidable necessity is that if, despite the best efforts of the defendant, the state of technical development is not sufficiently advanced, or the requisite equipment or materials are unprocurable, to remedy the condition complained of, a conviction under a municipal smoke ordinance is unreasonable and cannot stand.

The defense of unavoidable necessity was held to have been established in *People* v. *Detroit B. I. & W. Ferry Co.*, 187 Mich. 177, 153 N. W. 799 (1915). In that case the defendant was charged with violation of the Detroit smoke ordinance. Section 1 of the ordinance provided "that the emission of dense black or gray smoke from any smokestack * * * in any * * * boat * * * shall be a public nuisance *per se*." Section 6 of the ordinance provided, "The owner

* * * of any * * * steamboat * * * who shall cause, permit or allow such dense black or gray smoke to be emitted therefrom * * * shall be deemed guilty of creating a public nuisance and of violating the provisions of this ordinance." The violation charged to the defendant company was caused by its steamboats. The defendant raised, among others, the following defenses, that the ordinance was unreasonable and invalid (a) because there was no known appliance which could be used on marine boilers to prevent the issuance of smoke; (b) because it would destroy the value of defendant's property, it being a practical impossibility to rearrange the equipment of the boats so as to prevent the issuance of smoke; (c) because the ordinance destroys the value of defendant's property without making adequate compensation therefor, and deprives the defendant of its property without due process of law. At the trial, defendant produced testimony relating to "the reasonableness or unreasonableness of the ordinance as applied to marine practice; as to what devices to prevent the issuance of smoke had been able to accomplish on boats, and the experiments of this defendant and others with devices to prevent smoke emission and their impracticability in the operation of boats" (153 N. W. 799). The trial Court held the defendant guilty. This judgment was reversed by the Michigan Supreme Court on the ground that the defense of unavoidable necessity had been established. The Court reviewed the evidence as follows at 153 N. W. 801:

> "* * * we have given careful attention to the testimony introduced relative to the practicability and efficiency of the appliances used for the prevention of smoke in marine equipment in the present state of the art. We think it fair to assume that the conclusion reached by the learned judge who tried the case below was based upon his belief that the Jones underfeed stoker had reached such a state of perfection as to make its installation in marine practice feasible and reasonable, and the results to be obtained therefrom satisfactory. * * *

"Taken in its entirety, we are convinced that the testimony as to the impracticability of the Jones underfeed in marine practice fairly sustained the position of defendant."

Another case where convictions for violation of a municipal smoke ordinance were reversed because the ordinance was unreasonable as applied to the particular case, is *People* v. *Cunard White Star*, 280 N. Y. 413, 21 N. E. 2nd 489 (1939). The violations were by the steamships Queen Mary, Laconia and Carinthia. It appeared in the proofs that the smoke complained of could not be avoided. Judge LEHMAN, speaking for the Court, said at page 490:

"The validity of the ordinance is not challenged, if its scope is limited to prohibition of the discharge of smoke, avoidable by the use of modern appliances and of methods which are practicable. So limited, the ordinance is reasonably calculated to protect the health and comfort of residents and visitors in the city of New York, and the Legislature has delegated to city officers the power to pass such ordinances. The defendant is engaged in foreign commerce which though subject to regulation by the Congress of the United States, is not immune from the police power. The defendant does not claim such immunity. It asks the court to reverse the conviction for violation of the ordinance, on the ground that the ordinance is unreasonable and the police power does not justify unreasonable obstruction of its business as carrier in foreign commerce.

"The Defendant was convicted in spite of an offer to prove that 'all due and reasonable precautions were taken on board the ships at the time of each of these charges with respect to the reduction of smoke, and that such smoke as may have been created was only such smoke as is absolutely unavoidable under the conditions prevailing on those ships.' The defendant had previously shown that its steamships are provided with oil burning boilers

and with up-to-date and efficient smoke prevention appliances, and the court stated that it so found. The defendant admits, however, that at times smoke is discharged from its steamships, especially when cold boilers are being 'lighted up' and when a ship is entering or leaving port and the demands for steam fluctuate * * *.

"If the prohibition against the discharge of dense smoke is so applied that a steamship company may be found guilty of a violation because, in the operation of great liners with up-to-date equipment, dense smoke is discharged for a few minutes while a vessel is being prepared for departure, though it is shown that, even in the exercise of the greatest care, it would be impossible or impractical to avoid such smoke, then it seems to me clear beyond question that the ordinance is unreasonable, obstructs foreign commerce and exceed the power of the State."

And at page 491:

"In the Carinthia case the People argue that the conviction must be sustained because 'It is no defense to a violation of a public health law that a particular steamship has been so constructed and is so operated as to make continued violations a "necessary incident" to the defendant's carrying on his business.' That might be true if construction or operation is improper or if change there were practical. Here, however, there is no suggestion that either operation or construction is not in conformity with the highest standards or that occasional emission of smoke, for a few minutes on the day a vessel enters or leaves port, could be avoided by change which would not unreasonably obstruct the operation of the steamship."

The defense of unavoidable necessity was discussed by the Court of Appeals in *Bradley* v. *District of Columbia*,

20 App. D. C. 169 (1902), the Court concluding, however, that the evidence had not been able to establish the defense; consequently the conviction was sustained under the Act of Congress which declared the emission of dense black smoke to be a public nuisance. The Court said at page 175:

> "As the operation of the furnaces in large buildings for purposes of heating, power, etc., is unquestionably necessary to the enjoyment of their ownership, any regulation with which it would be impossible to comply by the use of any known and accessible fuel, would be beyond the power of Congress to enact. But an Act of Congress in the exercise of its ordinary police power, as this appears to be on its face, is not to be lightly set aside as unreasonable and oppressive. The conditions which would justify such an exercise of the judicial power of review must be clearly established.
>
> "The establishment of these conditions would necessitate a wide range of inquiry embracing the following, among others possibly:
>
> "(1) What is the condition of the particular furnace or furnaces and smokestacks under consideration in respect of construction, maintenance and operation?
>
> "(2) Have any well-known or approved smoke-consuming devices been applied in a manner and under conditions favorable to their operation?
>
> "(3) What character and quality of fuels are attainable in the market and have been used?
>
> "(4) Results of experiments made in good faith with the different fuels in connection with properly constructed furnaces and approved smoke-consuming appliances.
>
> "Evidence going to these points and perhaps others of like nature, should be received if offered on behalf of a defendant; and in connection with such as might be elicited by cross-examination, or intro-

> duced on behalf of the prosecution, would present the necessary facts on which the reasonableness of the statute may be fully and fairly determined."

In *People* v. *N. Y. Edison Co.*, 159 App. Div. 786, 144 N. Y. S. 707 (1913), the New York Appellate Division held that Section 181 of the New York City Sanitary Code, which merely prohibited the discharge of dense smoke, was not unreasonable on its face, but the Court was careful to recognize that the ordinance could not be validly applied to an unavoidable necessity. The Court said at page 713:

> "I am of the opinion, therefore, that it is perfectly clear that the court may not take judicial notice that this prohibition against the discharge of smoke is unreasonable and void; and that, if it may not take judicial notice to the contrary, it must, at least, until evidence impeaching the enactment, as by showing that it cannot be observed without extinguishing the fires in the furnaces to which it relates, or imposing upon the property owners an unreasonable burden in comparison with the public benefit in obtaining other fuel or equipment, is presented."

It should be observed that, despite the titles of some of the foregoing cases, the availability of the defense is not limited to public utilities or to instrumentalities of foreign commerce. The *Bradley* case involved the emission of smoke from an apartment house. An examination of the opinion in the *Detroit Ferry* case shows that whether the defendant was engaged in foreign commerce did not enter into the court's reasoning at all. In the *Cunard White Star* case, the defense was sustained on the ground of the misapplication of the police power, rather than on the ground of an interference with foreign commerce.

POINT IV

The court below has deprived petitioner of its property without due process of law.

The court below recognized in its opinion that the effect of the defense of unavoidable necessity "runs to the reasonableness of the ordinance".

We are not concerned with the reasonabless of the ordinance in general, but solely with its reasonableness as applied to the facts in the case at bar.

Cf. Snyder v. *Massachusetts*, 291 U. S. 97, 115.

This Court has repeatedly held that the exercise of the police power by a state must be consistent with due process by virtue of the Fourteenth Amendment, and must not be unreasonable, arbitrary or capricious in its operation.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111;
Nebbia v. *New York*, 291 U. S. 502, 525;
Panhandle Co. v. *Highway Commission*, 294 U. S. 613;
West v. *C. & P. Telephone Co.*, 295 U. S. 662;
Treigle v. *Acme Homestead Ass'n*, 297 U. S. 189, 197.

The actions of state courts and judicial officers in their official capacities may constitute the denial by a state of due process in contravention of the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 14.

The decision of the court below denies petitioner due process of law in that it results in an arbitrary and unreasonable application of the Hillside Smoke Ordinance to the facts at hand and effectively deprive the petitioner of its property without due process of law.

Since the uncontradicted evidence established that there was no known practical method of solving the problem as of July 31, 1950, the date of the offense charged, it was arbitrary and unreasonable for the court below to have held that the facts prior to July 31, 1950 did not support the application of the defense of unavoidable necessity, and to have grounded its determination on facts which arose thereafter and hence to have held that the conviction under the ordinance should be sustained.

The criteria laid down in *Bradley* v. *District of Columbia*, 20 App. D. C. 169 have been fully met in the proofs. (1) As of July 31, 1950 the appliances under consideration—the steam baking moulds—represent the most modern and up-to-date method known to the industry (D104a-31). (2) There are no well-known or approved devices for dealing with the steam and odor problem (D104a-35), and the defendant's long course of research and experimentation had disclosed none (D61a-24 to D62a-7); moreover, a quantity of water suffcient to condense the steam (D103a-8) is not available in Hillside (D103a-20), and even that would not eliminate the odor complained of (D103a-24). (3) The question of fuels, or of any material except possibly water, does not enter in to the situation herein. (4) Results of experiments down to the date of the filing of the complaint had been a failure (D61a-24 to D62a-7). It was unreasonable and arbitrary, therefore, for the court below to overrule the defense of unavoidable necessity and to apply the ordinance to the situation as it existed at the time the offense was allegedly committed.

So also, it was arbitrary and unreasonable for the court below to have applied the ordinance to the defendant on the basis of facts which did not develop until months after the complaint was filed.

The practical effect of the decision below is to proscribe the operation of defendant's plant. Considering the facts

that the defendant's plant is a large operation, established for many years, situated in the portion of Hillside zoned for industry, and employing the most modern and up-to-date method known to the cork industry, and the further fact that no substantial injury to the public welfare was shown by the proofs, it was manifestly unreasonable to require defendant's plant to cease its operations. Under the circumstances to do so was an arbitrary and unreasonable exercise of the police power, so as to deprive petitioner of its property without due process of law, particularly where, as here, there was no known practicable solution to the problem. This amounts to a violation of the Fourteenth Amendment.

CONCLUSION

The actual decision by the court below—that guilt in a criminal proceeding may be determined on the basis of facts occurring after the date of the offense and after the filing of the complaint—is without precedent. It raises questions of the denial of rights under the Federal Constitution which so far as known have never been passed upon by this Court.

Wherefore, it is respectfully submitted that the writ of certiorari prayed for should be granted.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. [redacted] 71 October Term—1952

MUNDET CORK CORPORATION,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES:

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IN THE

Supreme Court of the United States

No. 782 **October Term—1951**

MUNDET CORK CORPORATION,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counter-Statement of the Case

Petitioner was convicted in the Magistrate's Court of the Township of Hillside, of a violation of an ordinance (R. 95-99) of the Township of Hillside prohibiting the emission of smoke, fly ash and fumes of a specified density. On appeal to the Union County Court a trial *de novo* was held and a judgment of conviction was entered sentencing petitioner to pay a fine of $100.00.

The petitioner asserted various defenses at the trial *de novo* among which was the defense of unavoidable necessity, namely, that it was impossible for the petitioner to alleviate the density of emissions so as to comply with the ordinance. Briefs were submitted on many issues,

including the validity of the defense of unavoidable necessity. Judge HETFIELD of the Union County Court found that "the arguments advanced in defense of the violation of the ordinance in question are without merit" (R. 3).

Petitioner appealed to the Supreme Court of New Jersey and again asserted the validity of the defense of unavoidable necessity. The New Jersey Supreme Court affirmed the lower court's judgment of conviction. In his opinion for the court, Mr. Justice BURLING disposed of the defense of unavoidable necessity as follows:

> "Regardless of the philosophy of the doctrine, the facts do not support the application thereof * * *. There was no evidence introduced to show that compliance with the provisions of the ordinance by reduction of density of the emission, as opposed to complete elimination thereof, had been attempted or was not possible." (R. 112, 113)

The opinion went to great lengths to review the evidence to substantiate this finding. The court did not recognize the validity of the defense of unavoidable necessity but merely stated that regardless of the philosophy of the doctrine, the petitioner had failed to produce any evidence to establish such a defense.

Petitioner filed a petition for rehearing addressed to the New Jersey Supreme Court and for the first time raised the following Federal Constitutional questions:

> "7. By holding this defendant guilty in criminal proceedings on the basis of facts which did not come into being until months after the alleged offense had been committed, the Court has denied defendant due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

8. By holding this defendant guilty of violation of the Hillside Smoke Ordinance on July 31, 1950, as charged, on the basis of facts which did not come into being until months after the alleged violation occurred, this Court has permitted an unreasonable application of said Ordinance, so as to deprive defendant of its property without due process of law and violation of the Fourteenth Amendment of the Constitution of the United States."

The petition for rehearing was denied (R. 115). The court did not pass upon the Federal Constitutional questions raised by the petitioner.

The petitioner now requests that this court grant a Writ of Certiorari directed to the Supreme Court of New Jersey to review the judgment of said court affirming a judgment below. Petitioner contends that it has been denied due process of law under the Fourteenth Amendment of the United States Constitution in that the State Court found that the petitioner had failed to present any evidence of its affirmative defense of unavoidable necessity.

Jurisdiction

Petitioner contends that its rights under the Fourteenth Amendment of the Constitution of the United States have been violated and that this Court has jurisdiction by virtue of Section 1257 (3) of the Judicial Code (28 U. S. C. sec. 1257 (3).

The federal questions sought to be reviewed were raised for the first time by petition for rehearing to the Supreme Court of New Jersey. Said petition was denied by that court (R. 115). The federal questions were never passed upon or decided by the state court.

Questions Presented

(1) Whether the petitioner has been denied due process of law under the Fourteenth Amendment of the Constitution of the United States by an allegedly erroneous finding of the New Jersey Supreme Court that the petitioner's affirmative defense of unavoidable necessity fails, because among other reasons, the petitioner did not present any evidence to support same at the trial.

(2) Whether petitioner has been denied due process of law under the Fourteenth Amendment of the Constitution of the United States because of an alleged unreasonable application of a municipal ordinance by the New Jersey Supreme Court by virtue of its allegedly erroneous finding that petitioner's affirmative defense of unavoidable necessity fails because among other reasons the petitioner did not present any evidence to support same at the trial.

ARGUMENT IN OPPOSITION

POINT I

The state court judgment is adequately supported by a non-federal ground.

This Court has many times adhered to the principle that it will not review a judgment of a state court which can be based upon a non-federal ground regardless of possible error of the state court upon a federal question. *Williams* v. *Kaiser*, 323 U. S. 471, 477, *Radio Station WOW Inc.* v. *Johnson*, 326 U. S. 120, 129, *Fox Film Corp.* v. *Muller*, 296 U. S. 207. In *Herb* v. *Pitcairn*, 324 U. S. 117 Mr. Justice JACKSON in his opinion for the Court says at page 125:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall. (U S) 590, 636, 22 L ed 429, 444; Berea College v. Kentucky, 211 U S 45, 53, 53 L ed 81, 85, 29 S Ct 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 U S 157, 164, 61 L ed 644, 648, 37 S Ct 318; Fox Film Corp. v. Muller, 296 U S 207, 80 L ed 158, 56 S Ct 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

(a) The judgment of the state court is based on alternative grounds.

In the case at bar the petitioner raised the defense of unavoidable necessity in the state trial court and briefs were submitted on that question. The judge of the trial court saw no validity to the defense of unavoidable necessity and disposed of that defense as well as several other defenses in his opinion:

> "After a careful study and examination of briefs submitted by counsel, it is the opinion of this court that the argument advanced in defense of the violation of the ordinance in question are without merit." (R. 3)

On appeal the New Jersey Supreme Court affirmed the judgment below. On the question of the defense of unavoidable necessity the higher court did not feel that it was necessary to dispose of the defense of unavoidable necessity by merely stating that such a defense had no validity in New Jersey. Rather the court stated:

> "Regardless of the philosophy of the doctrine, the facts do not support the application thereof * * *. There was no evidence introduced to show that compliance with the provisions of the ordinance by reduction of density of the emission, as opposed to complete elimination thereof, had been attempted or was not possible." (R. 112, 113)

Thus the New Jersey Supreme Court affirmed the judgment below denying the defense of unavoidable necessity on two grounds:

(1) Failure of the petitioner to introduce any evidence to factually establish the defense, and

(2) Invalidity of the defense as a matter of New Jersey law.

(b) Under New Jersey law the defense of unavoidable necessity is not available to the petitioner in this case.

In affirming the judgment below by recognizing that the petitioner could not avail itself of the defense of unavoidable necessity in this case the New Jersey Supreme Court merely followed the well established law of the State of New Jersey and, as far as we can gather, the law of every state in the United States. Thus it has been held that under certain conditions a party directly engaged in interstate or foreign commerce or chartered as a public utility may be able to avail itself of the defense of unavoidable necessity in an action for nuisance or violation of a municipal ordinance. However, this defense is never available to a private individual or corporation such as the petitioner whose activities do not fall within one of these categories.

In fact in *Board of Health of Weehawken* v. *N. Y. Central Railroad Co.*, 4, N. J. 293 (1950), 72 Atl. (2) 511, the Supreme Court of New Jersey held that this defense was not even available to a railroad under prosecution for violation of an ordinance very similar to the one in question. There the Court said:

> "Section 2 of the ordinance denounces as a public nuisance the emission within the municipality of smoke of the prescribed density; and the insistence is that under Pennsylvania Railroad Co. v. Jersey City, 84 N. J. L. 716, 87 A. 465, 49 L. R. A., N. S. 715 (E. & A., 1913), and Jersey City v. Erie Railroad Co., 84 N. J. L. 761, 87 A. 467 (E. & A., 1913), such a direction against a railroad company is ultra vires and void. The ratio decidendi of these cases is that the non-negligent emission of smoke from the smokestacks of locomotives used in the operation of a railroad is an irremediable incident of the exercise of the legislative franchise, and

not within local control except as expressly provided. But it is said that the principle is by analogy applicable to a railroad power plant as a necessary operating facility. We do not perceive the analogy.

"Quite different considerations govern the use of locomotives in the operation of a railroad through the State and the management of a local power plant such as we have here. It is beyond the local province to proscribe smoke in the operation of locomotives under a railroad character, unless its escape be attributable to negligence or want of care. There cannot be in the nature of things a delegation of regulative power which in its varying local application would render function under the State's charter impracticable. State v. Erie Railroad Co., 84 N. J. L. 661, 87 A. 141, 46 L. R. A., N. S. 117 (E. & A., 1913). The principal has no bearing upon the functioning of terminal facilities and fixed installations, such as engine houses and repair shops. Beseman v. Pennsylvania Railroad Co., 50 N. J. L. 235, 13 A. 164 (Sup. Ct., 1888), affirmed 52 N. J. L. 221, 20 A. 169 (E. & A., 1889); Ridge v. Pennsylvania Railroad Co., 58 N. J. Eq. 172, 43 A. 275 (Ch., 1899); Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883)."

In *Beseman* v. *Pennsylvania Railroad Co.*, 50 N. J. L. 235, 13 Atl. 164, the Supreme Court in an opinion by Chief Justice BEASLEY upheld the immunity of a railroad from an action for nuisance where there was no evidence of negligence on the part of the defendant. The Chief Justice was careful however to rest his decision on the ground that the railroad was a public utility:

"This latter contention must, I think, be sustained. The legislative power is amply competent for such a purpose, and it is obvious that it has put forth such power. It is a radical error to regard

these corporations as simply private. They have a public as well as a private aspect, and it is on this account that the immunity in question belongs to them.

* * * It is stated to be a damage (damnum), but it is absque injuria, because the cause producing it is legalized, in promotion of the general welfare.

* * * For my part, therefore, I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office; for to me it does not appear to be consistent with reason to declare that these exemptions may be legislatively bestowed upon an inconsiderable turnpike company but cannot be given in favor of these great highways connecting distant countries and extending over a continent."

See also *Ridge* v. *Pennsylvania Railroad Co.*, 58 N. J. Eq. 172, 43 Atl. 275; *Matthias* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 125 Minn. 224, 146 N. W. 353, 69 A. L. R. 1188.

In *People* v. *Cunard White Star*, 280 N. Y. 413, 21 N. E. (2nd) 489 (1939), cited in petitioner's brief at page 33, it was charged that the ocean liners, Queen Mary, Laconia and Carinthia had violated an ordinance prohibiting the discharge of dense smoke within the city of New York. The alleged violations were admittedly very infrequent, occurring only when the ships were entering or leaving port. The Court held that to find a violation of the ordinance based upon these facts would be an unreasonable obstruction of foreign commerce.

And again in *People* v. *Detroit B. I. & W. Ferry Co.*, 187 Mich. 177, 153 N. W. 799 (1915), cited in petitioner's brief at page 31, the Court was confronted with an alleged violation of an ordinance prohibiting the emission of dense smoke within the City of Detroit. The defendant

owned boats engaged in interstate commerce on the Detroit River and the Great Lakes. The Court reversed a conviction under the ordinance. In doing so the Court appears to assume that boats engaged in interstate commerce could not be convicted of a violation of a municipal ordinance unless it was shown that there had been a negligent operation. Thus the Court followed the usual rule that a municipality cannot unreasonably interfere with interstate or foreign commerce, or with a chartered right of a public utility. In *People* v. *N. Y. Edison Co.*, 159 App. Div. 786, 144 N. Y. S. 707 (1913), cited in petitioner's brief at page 36, the issue of unavoidable necessity was never before the Court.

In *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, 60 L. Ed. 397 (1915), the City of Des Moines brought an action against the defendant to enforce the penal provisions of an ordinance prohibiting the emission of dense smoke within the city. The defendant filed a bill in the United States District Court to enjoin the enforcement of the ordinance on the ground that it violated the due process clause of the United States Constitution. The bill was dismissed by the District Court. The United States Supreme Court affirmed, saying at page 491:

> "So far as the Federal Constitution is concerned, we have no doubt the state may by itself or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interest, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this

> court are Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; Chicago & A. R. Co. v. Tranberger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; Hadacheck v. Sebastian, decided December 20th, 1915 (239 U. S. 394, ante, 348, 36 Sup. Ct. Rep. 143)."

That such emission of smoke is within the regulatory power of the state has been often affirmed by state courts.

In *Moses* v. *United States,* 16 App. D. C. 428 (1900), the defendant was convicted of a violation of an Act of Congress prohibiting the emission of dense or thick black or gray smoke or cinders within the District of Columbia. On appeal the conviction was affirmed by the Court of Appeals. One of the grounds of alleged error below was the lower Court's exclusion of defendant's testimony to the effect that there was no known device which could eliminate the emission of the dense smoke. The Court of Appeals upholds the lower Court's holding saying at page 440:

> "The evidence was excluded and exceptions taken. In this there was no error. That there may be no smoke consuming appliance that will, under all circumstances, prevent the nuisance, is not a matter of relevancy. The facts concerning them were presumably within the knowledge of Congress also when it took action; and no provision has been made for their use. The use of smokeless fuel instead may have been expressly contemplated."

In *Baltimore & Potomac Railroad Company* v. *Fifth Baptist Church,* 108 U. S. 317, 27 L. Ed. 739 (1883) the Fifth Baptist Church brought an action for damages alleging that the railroad had erected an engine house and a machine shop on a lot adjoining the church and was using same in such a manner as to disturb various church assemblages and to destroy the value of the church build-

ing. There was judgment for the plaintiff below which was affirmed by the United States Supreme Court. At page 334 the Court stated:

> "If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and work shop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the Company to answer its purposes.
>
> There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter-houses, lime-kilns and tallow furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. Fish v. Dodge, 4 Den., 312."

In *Meadowbrook Swimming Club Inc.* v. *Albert*, 197 Atl. 146 (Md., 1938), an injunction decree was granted

against the continuance of a noise nuisance. The decree was affirmed, the Court saying at page 148:

> "The law is clear that where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property a wrong is done to a neighboring owner for which an action lies at law or equity. In such cases it makes no difference that the business was lawful and one useful to the public and conducted in the most approved method. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 A. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; Scott v. Bay, 3 Md. 431; Lurssen v. Lloyd, 76 Md. 360, 25 A. 294; Northern Cent. Ry. Co. v. Oldenburg & Kelley, 122 Md. 236, 89 A. 601. Jackson v. Shawinigan, etc., Co., 132 Md. 128, 103 A. 453."

In *Signal Mountain Portland Cement Co.* v. *Brown, et al.*, 141 F. (2d) 471 (C. C. A. 6, 1944), an action was brought by adjoining property owners against the cement company for nuisance caused by dust. The case was remanded upon the sole ground of an erroneous ruling with respect to preemptory challenges. The Court applied the law of Tennessee saying:

> "Perhaps the outstanding nuisance case in Tennessee jurisprudence is Ducktown Sulphur, Copper & Iron Co. Ltd., v. Barnes, 60 S. W. 593 in which the State Supreme Court adopted in entirety the opinion of the Court of Chancery Appeals and affirmed its decree, with modification only as to a minor particular with respect to the basis for damages to growing crops. It was held that where smoke and noxious gases from smelting works injured the property and endangered the health of adjoining land owners an action for damages would lie, even though the business of the defendant was conducted in a suitable locality with the most approved appliances and furnished employment, directly or indirectly, to nearly the whole community."

In the New Jersey case of *McAndrews* v. *Collerd*, 42 N. J. L. 189, it was sought to abate a nuisance consisting of the storage of explosives which were being used for the blasting of a railroad tunnel. The defense of unavoidable necessity was raised, it being stated that the work could not be done without the presence and use of the explosives. The Court held that there where a nuisance complained of is a public nuisance no degree of care will relieve from liability for damages arising from it, the Court stating "the proposition that the legislative authority to a private corporation, or an individual, to do a work for its or his own profit includes authority to use at whatever hazard to the person or property of others, dangerous materials, provided they be necessary to the convenient prosecution of the work, cannot be sustained."

The law is well settled that the petitioner cannot avail himself of the defense of unavoidable necessity in this case. Petitioner has not cited a single authority to show that New Jersey or any other state recognizes the validity of the defense of unavoidable necessity in a case such as this. Therefore regardless of the alleged federal questions raised by the petitioner, the judgment of the state court must stand since under New Jersey law the defense of unavoidable necessity is not a valid one. A reversal of the state court upon the alleged federal questions will not affect the judgment of that court.

In this regard in *William* v. *Kaiser*, 323 U. S. 471, 477, it was stated:

> "It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision

of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U.S. 14, 18, 81 L. ed. 476, 478, 57 S. Ct. 350; Lynch v. New York, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16, and where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."

See *Hammerstein* v. *Superior Court of California,* 340 U. S. 622.

We submit that in view of the adequate non-federal grounds supporting the judgment of the state court this Court should refuse to grant a writ of certiorari.

POINT II

The raising of the federal questions is untimely.

(a) The federal questions were raised for the first time on the petition for rehearing to the Supreme Court of New Jersey and that court never decided or passed on said questions.

Petitioner admittedly raised the two federal questions for the first time in its petition for rehearing addressed to the Supreme Court of New Jersey. The petition for rehearing was denied by that court without passing upon the federal questions.

This Court has time and again stated that raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the state court entertains the petition and expressly decides the question. *Radio Station WOW Inc.* v. *Johnson,* 326 U. S. 120, 128, *Herndon* v. *Georgia,* 295 U. S. 441, 443.

Here the federal questions were raised for the first time on a petition for rehearing addressed to the highest

court of New Jersey. That court refused to entertain the petition and rendered no opinion on the federal questions presented. There is no state decision on a federal question before this Court and therefore this Court should refuse to grant a writ of certiorari.

(b) The record filed with this Court does not affirmatively show that a federal question was presented to the state court.

The record filed with this Court does not affirmatively show that a federal question was presented to the state court. This itself is a valid reason for a denial of this petition for writ of certiorari. Thus in *Williams* v. *Kaiser*, 323 U. S. 471, 477 it was stated:

> "It is a well established principle of this Court that before we will review a decision of the state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

See *White River Lumber Company* v. *State of Arkansas ex rel H. W. Applegate*, 279 U. S. 692, 700, *Whitney* v. *California*, 274 U. S. 361.

In view of the fact that the record fails to show that a federal question was presented to the state court the petition for writ of certiorari should be denied.

POINT III

There was no evidence that the petitioner was unable to comply with the terms of the ordinance.

Petitioner ask this Court to review a finding made by the New Jersey Supreme Court that none of the evidence presented before the trial indicated that petitioner was un-

able to comply with the air pollution ordinance. Petitioner sets forth in its argument a great deal of evidence presented at the trial in support of its contention that it could not comply with the ordinance. However, a careful analysis of this evidence, such as that made by the New Jersey Supreme Court, shows clearly that all of such evidence was directed to a complete elimination of all smoke, odors and fumes. As stated by that court—"There was no evidence introduced to show that compliance with the provisions of the ordinance by reduction of density of the emission, as opposed to complete elimination thereof, had been attempted or was not possible" (R. 113).

Although there was testimony to the contrary there was evidence presented to the effect that a *complete elimination* of the density of emission was not possible. However, as stated in the New Jersey Supreme Court opinion the ordinance does not require a complete elimination of smoke, fumes and odors, but merely requires the elimination of all smoke, fumes and odors of a specified density. The ordinance sets up a standard test to be applied. This standard test has been very widely adopted in municipal ordinances in New Jersey and such ordinances have been upheld as constitutional by the New Jersey Supreme Court. *Board of Health of Weehawken* v. *N. Y. Central Railroad Co.*, 4 N. J. 293 (1950), 72 Atl. (2) 511, *State of New Jersey* v. *Mundet Cork Corporation*, 8 N. J. 359 (1952), 86 Atl. (2) 1. There was absolutely no evidence indicating that it was impossible for the petitioner to alleviate the condition so as to comply with the ordinance.

In addition it must be remembered that the defense of unavoidable necessity is an affirmative defense which the petitioner had the burden of proving at the trial. Even if the state court were wrong in its finding that no evidence of unavoidable necessity was presented this would by no means show that petitioner had sustained the burden of affirmatively proving the defense.

POINT IV

This Court should not review findings of fact made by a state court.

The trier of facts in the lower state court, after hearing all of the evidence and studying the briefs, found that there was no merit to the petitioner's asserted defense of unavoidable necessity. On appeal the New Jersey Supreme Court affirmed the judgment below after making an independent analysis of the evidence presented below. The New Jersey Supreme Court found that no such evidence of unavoidable necessity was even presented.

Petitioner now asks this Court to make an independent review of these findings of fact and to find that not only was there evidence of unavoidable necessity but that the proofs of same were overwhelming as to establish petitioner's affirmative defense of unavoidable necessity.

It is well settled that this Court will not exercise its jurisdiction to merely review a state court's findings of facts. *Grayson* v. *Harris*, 267 U. S. 352, 358, *Portland Railway Light & Power Co.* v. *Railroad Commission*, 229 U. S. 397, 412. It is only where the conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former that this Court will analyze the facts to see that the federal right was preserved. *Norris* v. *Alabama*, 294 U. S. 587, 590. In our case no violation of a federal right was asserted by the petitioner in the lower state court nor on appeal to the New Jersey Supreme Court. The state court made no conclusion of law as to a federal right.

In addition there is the fact that the state court decision was based on alternative grounds. Even if this Court were to reverse that court on the federal ground, the judgment below would still stand on the non-federal ground.

POINT V

There is no compelling reason for this Court to grant the writ of certiorari.

The issues involved in this case rest upon facts presented at the trial. The petitioner was convicted of the violation of an air pollution ordinance of the Township of Hillside. Testimony was taken and documentary evidence presented. The trial court found that the petitioner had violated the ordinance and entered a judgment of conviction ordering the petitioner to pay a fine of $100.00. On appeal the judgment was affirmed by the New Jersey Supreme Court.

The questions involved are not of national interest nor are many parties affected by the precedence of the conviction. Every case such as this must rest upon its own particular facts. The evidence clearly revealed that the petitioner had violated the ordinance. Petitioner made little or no effort to contest this.

Petitioner raised the defense of unavoidable necessity before the state courts contending that it was unable to comply with the terms of the ordinance. The state courts rejected the asserted defense on two grounds:

(1) Failure of the petitioner to introduce any evidence to factually establish the defense, and

(2) Invalidity of the defense as a matter of New Jersey law.

Each of said grounds alone is sufficient to support the state court judgments. Petitioner now states that in finding the first ground above the New Jersey Supreme Court violated the petitioner's federal rights. Even assuming that the petitioner were right in this assertion the judg-

ment of the state court would not be altered. The second ground above is adequate in sustaining the judgment.

Petitioner is in reality objecting to the language of the opinion of the New Jersey Supreme Court and asserts that the court's finding of the first ground above violates petitioner's federal rights. This Court will not grant writ of certiorari to merely correct erroneous statements made in a state court opinion or erroneous findings which do not effect the final result. Mr. Justice JACKSON in his opinion for the court in *Herb* v. *Pitcairn,* 324 U. S. 117, at page 125 says:

> "And our power is to correct wrong judgments, not to revise opinions."

Reservation of Other Defenses

In the event that this Court grants the writ of certiorari applied for, respondent reserves the right and intends to argue, in addition to the points briefed herein, the following:

(1) The petitioner was not held guilty in criminal proceedings on the basis of facts which did not come into being until months after the offense had been committed.

(2) There has been no violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, we urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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